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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs. } No. 310

JNO. H. POLSDORFER AND WIFE, Defendants in Error.

Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of the Plaintiff in Error

ON DEFENDANTS' MOTION TO DISMISS AND TO AFFIRM.

THOS. B. TURLEY,
J. B. HEISKELL,
Attorneys for Plaintiff in Error.

J. C. TOLF & CO., PPS. & LITHS. MEMPHIS

BRIEF OF PLAINTIFF IN ERROR

On Defendants in Error's Motion to Dismiss and to Affirm.

I.

The first ground relied on by appellee in support of his motion to dismiss the writ of error is, that the judgment of the Circuit Court of Appeals dismissing the writ of error sued out from that court to the Circuit Court is final.

Section 5 and 6 of the act of March 3rd, 1891, regulate the method of reviewing the decrees and judgments of the District and Circuit Courts of the United States. Section 5 provides that an appeal, or writ of error, may be taken from said court direct to the Supreme Court of the United States in six classes of cases enumerated therein. Section 6 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal, or by writ of error, final decisions in said district and circuit courts, in all cases other than those provided for in section five, unless otherwise provided by law.

It further provides that all judgments and decrees of the Circuit Court of Appeals, shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also, in all cases arising under the patent, revenue, criminal and admiralty laws. It provides further, that in all cases in which the judgment or decree of the Circuit Court of Appeals is not made final, by the provisions in said section 6, there shall be right of an appeal, or writ of error, or review of the case by the

Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

If we give to the language used in these two sections its ordinary meaning, it would seem, that in the six classes of cases mentioned in section 5, the appeal or writ of error must be to the Supreme Court, and not to the Circuit Court of Appeals, and that in all other cases the writ of error or appeal must be, at least in the first instance, to the Circuit Court of Appeals. In this latter class of cases, if the jurisdiction is dependent entirely upon diverse citizenship; or, if it rests upon the patent, revenue, criminal, or admiralty laws of the United States, the decision of the Circuit Court of Appeals is final, and no writ of error or appeal can be taken to the Supreme Court of the United States. But, in any other cases over which the Circuit Court of Appeals has appellate jurisdiction there may be a writ of error or appeal to the Supreme Court.

The Northern Pacific Railroad Company v. Amato, 144 U. S. 465, and Union Pacific Railway Company v. Harris, 158 U. S. 326, are examples of cases not embraced in section 5 of the act of March the 3rd, 1891, over which the Circuit Court of Appeals has appellate jurisdiction, but in which its decrees and judgments are not final, and which are subject to further review by appeal or writ of error to the Supreme Court of the United States.

The first of these cases was instituted in the Supreme Court of New York. The complaint showed that the plaintiff was a resident of New York, and the defendant, a corporation chartered by Congress, a citizen of the United States. The case seems to have been removed to the Circuit Court of the United States, on the ground that the defendant was a corporation created by act of Congress. There was judgment for the plaintiff in the Circuit Court of the United States. The case was carried by writ of error to the Circuit Court of

Appeals, where the judgment of the Circuit Court was affirmed, and thereupon, the case was brought by writ of error, to the Supreme Court of the United States. Motion was made to dismiss the writ of error because the judgment of the Circuit Court of Appeals was final. This court held that the case did not depend entirely upon the fact that the opposite parties were, one an alien and the other a citizen of the United States, or, one a citizen of one State and the other a citizen of a different State; but it depended also upon the fact that the defendant was a corporation created by act of Congress. It held further, that the case was not provided for in section 5 of the act of 1891, and that it was not one of that class of cases in which the judgment or decree of the Circuit Court of Appeals was made final by section 6 of said act. The result was, the motion to dismiss was overruled.

The second of said cases was instituted in the Circuit Court of the United States. The jurisdiction was expressly placed upon diverse citizenship of the parties. The defendant was a corporation created under the laws of the United States. The case was carried by writ of error to the Circuit Court of Appeals, and from that court by writ of error to the Supreme Court. The motion to dismiss was made upon the same ground as in the first case above, and was overruled for the same reason. The act of March, 1891, has been construed by this court in various other cases. One of the earliest of these cases is McLish v. Roff, 141 U. S. 661. "That was an ejectment suit brought in the United States Court for the Indian Territory. The jurisdiction of the court was challenged by demurrer. The demurrer was overruled. The defendant insisted that he was entitled to have the question of jurisdiction carried by writ of error to the Supreme Court before the trial of the case on its merits in the lower court, and he asked the lower court to certify the question of jurisdiction to the Supreme Court, and to proceed no further until the jurisdic-

tion should be decided by the Supreme Court. This request was denied by the lower court upon the ground, that after a trial of the case upon the merits, the defendant could carry the question of jurisdiction to the Supreme Court. This court sustained the action of the court below. In the course of the opinion the court announced that it was a matter of public history, and manifest from the face of the act of 1891, that its primary object was to facilitate prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases, resulting from the rapid growth of the country and the steady increase of its litigations."

It further announced, that "The true purpose of the act, as gathered from its context is, that the writ of error or appeal may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

Another case is the Colorado Central Consolidated Mining Company v. Turck, 150 U. S. 138. That was an action of ejectment, brought in the Circuit Court of the United States for the district of Colorado. In the complaint the jurisdiction was based solely upon diverse citizenship. The defendant, in its second defence, raised a question which it claimed depended upon the construction and application of the law of the United States. The case was tried on its merits in the Circuit Court, where a verdict and judgment were rendered for plaintiff. Writ of error was taken to the Circuit Court of Appeals, where the judgment of the Circuit Court was affirmed, and the case was then brought by writ of error to this court. Motion to dismiss the writ of error was sustained,

upon the ground that when the original jurisdiction of the Circuit Court of the United States is invoked, upon the sole ground that the determination of the suit depends upon some Federal question, it must appear at the outset, and from the declaration of complaint, that the suit is of that character. The court held that in the complaint the sole ground of jurisdiction set forth was diverse citizenship, and this being so the judgment of the Circuit Court of Appeals was conclusive. It will be noticed that the case was tried on the merits in both the Circuit Court and the Circuit Court of Appeals.

In Nishimura Ekui v. the United States, 142 U. S. 659, this court held that under the act of 1891, whenever the constitutionality of a law of the United States was involved, an appeal or writ of error would lie direct from the Circuit Court of the United States to this court.

In Horner v. United States, 143 U. S. 571, the question arose as follows: Horner was arrested and brought before the commissioners of the United States for violating section 3894 of the revenue statute. Horner obtained a writ of habeas corpus from the Circuit Court of the United States for the Southern District of New York, which writ, on hearing, was by that court dismissed. Horner thereupon appealed to this court. It was insisted that this court had no jurisdiction of the appeal, and that the appeal ought to have been taken to the Circuit Court of Appeals. The court held, that inasmuch as the constitutionality of section 3894 was drawn into question the appeal lay directly to this court under section 5 of the act of March 3d, 1891. It held further, that in cases where the constitutionality of a law of the United States is drawn into question, this court acquires jurisdiction under said act of 1891 of the entire case and all questions involved in it, and not solely of the question of the constitutionality of the law of the United States, distinguishing its jurisdiction in

such cases from appellate jurisdiction given by section 5 over questions involving the jurisdiction of the Circuit Court of the United States.

In the United States v. Jahn, 155 U. S. 109, the facts were as follows: Jahn & Co. withdrew from the warehouse in New York for export to Montreal certain molasses which had been imported into New York. Upon such withdrawal the collector of customs exacted a charge of ten cents per cask for gauging, etc., under the provisions of section 3023 of the Revenue Statute. Jahn & Co. protested, claiming that said section has been abolished by a later law. The matter was taken before the Board of General Appraisers, which sustained the collector. Jahn & Co. appealed to the Circuit Court of the United States, which court reversed the decision of the Board of General Appraisers. The United States then appealed to the Circuit Court of Appeals and assigned for error that the Circuit Court of the United States had no jurisdiction of the matter, because the decision of the board of appraisers was final and conclusive. Thereupon the question of whether the Circuit Court had or had not jurisdiction was certified to this court by the Circuit Court of Appeals. In construing sections 5 and 6 of the act of 1891 this court held that the Circuit Court of Appeals exercised appellate jurisdiction under the 6th section of all other cases than those in which the jurisdiction of this court is exercised under section 5. In construing that portion of the 5th section, under which this court exercised appellate jurisdiction in cases in which the jurisdiction of the Circuit Court of the United States is in issue, it pointed out the difference between cases of this kind and the other classes of cases over which this court is given appellate jurisdiction by section 5. Its language on this point was as follows: "The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in

which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case, and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under section 5." It held further, that when the jurisdiction of the Circuit Court was attacked, if that court sustains its jurisdiction and decides against the defendant on the merits, the defendant can elect either to bring the case direct to this court under section 5 or to carry it to the Circuit Court of Appeals, section 6, and have the question of jurisdiction certified from that court to this court. If he elects to bring the case direct to this court under section 5 he waives his contention on the merits of the case, because as explained the act does not contemplate two appeals or writs of error and two hearings on the whole case at the same time, by the same parties, in two different appellate courts. If the defendant carries the case to the Circuit Court of Appeals he thereby saves his contention on the merits, and the case will be held in that court until the question of jurisdiction is certified to this court and here decided.

See also Glaspell v. Northern Pacific R. R. Co., 144 U. S. 211.

The case of Borgmeyer v. Idler, 159 U. S. 408, was very similar in its facts and was identical in its procedure with the case of Colorado Mining Company v. Turck, 150 U. S. 138, commented on above. It was disposed of in the same way and for the same reason. It will be noticed that in that case, as in the case of the Mining Company v. Turck, there

was a trial on the merits, both in the Circuit Court of the United States and the Circuit Court of Appeals.

The next case is Chappell v. United States, 160 U. S. 508, 509. It was again held that where the constitutionality of a law of the United States is drawn into question the appeal or writ of error should be taken under section 5 of the act of 1891 direct to this court, which has power to dispose of the whole case.

In Cornell v. Green, 163 U. S. 75, which was a direct appeal in equity from the Circuit Court of the United States to this court, upon a claim that a Federal question was involved, this court held that inasmuch as the suit had been instituted originally in the Circuit Court of the United States it was necessary that the Federal question should have been raised in that court, and finding no such question was raised in that court the appeal was dismissed. It was a case which ought to have been taken to the Circuit Court of Appeals, because of diverse citizenship.

Ex parte Jones, 164 U. S. pages 692 and 693, is an affirmance of the case of Mining Company v. Turck, 150 U. S. 138, and Borgmeyer v. Idler, 159 U. S. 408. This, like the two cases just cited, was a case brought in the Circuit Court of the United States solely on the ground of diverse citizenship. There was a trial on the merits in the Circuit Court. The case was then carried to the Circuit Court of Appeals, where it was again tried on its merits. An appeal was prayed to this court, which was denied by the Circuit Court of Appeals, and thereupon a petition for mandamus was filed in this court to compel the Circuit Court of Appeals to grant said appeal, which petition was refused on the ground stated above.

In Robinson v. Caldwell, 165 U. S. 359, the procedure was as follows: Suit was instituted in a district court in Idaho. It was removed to the Circuit Court of the United

States, presumably on adverse citizenship. It was tried in that court on the merits, and a decree was rendered in favor of the plaintiff. The defendant then appealed direct to this court. He also prosecuted an appeal to the Circuit Court of Appeals, which court again determined the case on the merits in favor of the plaintiff. In this court the defendant insisted that the Circuit Court of the United States had no jurisdiction to entertain the case. This court dismissed the appeal, because the case having been carried by appeal to the Circuit Court of Appeals no question of jurisdiction had been certified from that court to this court. It again lays down the rule that it was not the purpose of the judiciary act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in this court and in the Circuit Court of Appeals.

In Holder v. Aultman, 169 U. S. 81, the plaintiff sued the defendant in the Circuit Court for the Eastern District of Michigan to recover the price of agricultural machines. The defendant plead that the plaintiff was a foreign corporation and had not complied with the provisions of the statute of Michigan, making void all contracts entered into in that State by foreign corporations which had not complied with the provisions of said act. The case was tried in the Circuit Court, and that court held that the contract was made in Ohio and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State, under said contract, was in conflict with the Constitution of the United States. Judgment was thereupon rendered for plaintiff, and the defendant sued out a writ of error from this court on the ground that the case was one in which a law of the State was claimed to be in contravention of the Constitution of the United States. This court held that the case was rightfully brought direct to it on writ of error, under section 5 of

the act of March 3d, 1891, and that this court had jurisdiction over the whole case.

In Loeb v. Columbia Township Trustees, 179 U. S. 473, this court held that where a case is brought direct from the Circuit Court of the United States to this court, by writ of error, under section 5 of the act of 1891, on the ground that a state law is in conflict with the Constitution of the United States, it is not necessary that this question should be disclosed in the original petition, bill or complaint, but it is sufficient if it clearly appears anywhere in the record. It appeared in this case by the opinion of the circuit judge. The suit was instituted in the Circuit Court of the United States on the ground of diverse citizenship, and the question that a statute of Ohio was repugnant to the Constitution of the United States was raised by the defendant, and appeared, as stated, by the opinion of the circuit judge. It was insisted that when the original jurisdiction of the Circuit Court is invoked by the plaintiff, only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a State law to the Constitution of the United States, made in his answer or plea, or in the course of the trial, is not sufficient to give this court jurisdiction upon writ of error to review the final judgment of the Circuit Court. This contention was not sustained, and this court pointed out the difference between a case like the one which was then before it and cases involving the jurisdiction of the Circuit Court, and which could be carried on the question of jurisdiction either directly to this court, or on the merits to the Circuit Court of Appeals, which court could certify the question of jurisdiction to this court. In the latter class of cases the court said if the original petition or complaint in the Circuit Court invoked the jurisdiction of that court, solely on diverse citizenship, and the case was carried to the Circuit Court of Appeals, it could not then be brought to this court, because

the defendant, in the course of his defence, had raised some question embraced in section 5 of the act of 1891.

The court again cited, with approval, the holding in Robinson versus Caldwell, 165 U. S. 359–362, that, "It was not the purpose of the judiciary act of 1891, to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in this court and in the Circuit Court of Appeals."

It may be of some avail to analyse and compare some of these decisions.

The case of Mining Company v. Turck, 150 U. S., and its kindred cases, referred to above, announce the doctrine broadly, that when the original jurisdiction of the Circuit Court of the United States is invoked it must appear at the outset from the declaration, or bill, or complaint of the party suing, that it is a case of which the Circuit Court, at the very time its jurisdiction is invoked, could properly take cognizance. Under this doctrine they hold, that if an original suit is brought in the Circuit Court solely on the ground of diverse citizenship, and is carried to the Circuit Court of Appeals, no other ground of jurisdiction can be looked to. In the particular case of Mining Company v. Turck, the complainant alleged diverse citizenship. The defendant in the course of his defense relied upon a Federal statute. The case was carried by defendant, as already stated, to the Circuit Court of Appeals, and when that court decided against him he sued out a writ of error in this court, which writ of error was dismissed on the ground stated above.

There are cases of Federal jurisdiction which are not embraced under section 5 of the act of 1891, in which the judgment or decree of the Circuit Court of Appeals is not final under section 6 of said act. Examples of these cases have been cited above. See 144 U. S. 471; 158 U. S. 326. In these cases the declarations or complaints disclosed that the original

jurisdiction of the Circuit Court was invoked on account of diverse citizenship, but they further disclosed that the defendants were corporations organized under the laws of the United States.

Suppose a ground of Federal jurisdiction not embraced in section 5 of the act of 1891, and in which the judgment or decree of the Circuit Court of Appeals is not conclusive, is first disclosed by defendant's plea, or by subsequent proceedings, in a case in which the original jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, or on one of the other grounds in which the decision of the Circuit Court of Appeals is final. If, in such case, there was a judgment against the defendant, and he carried the case by writ of error or appeal to the Circuit Court of Appeals, and judgment was there rendered against him, and he then sought to bring the case to this court by writ of error or appeal, how would it stand in this court?

If the doctrine laid down in Mining Company v. Turck be enforced, would the writ of error in this court be dismissed because the original declaration or complaint placed the jurisdiction of the Circuit Court solely on a ground in which the decree or judgment of the Circuit Court of Appeals was final? If so, then wherever a case involved two grounds of Federal jurisdiction, neither of which is embraced in section 5 of the Act of 1891, and as to one of which the judgment or decree of the Circuit Court of Appeals is final, and as to the other is not final, then the plaintiff suing in the Circuit Court can, by invoking its jurisdiction solely on the ground as to which the judgment or decree of the Circuit Court of Appeals will be final, deprive the defendant of the right given him to carry the case from the Circuit Court of Appeals to this court by writ of error or appeal. Such a result would be contrary to the principle laid down in Loeb v. Columbia Township Trustees, *supra*, which case, it will be seen, discountenances

the idea that one party can, by the method or way in which he brings his suit, deprive the other of a right of review by this court. Further, the case of Loeb v. Columbia Township Trustees, as already shown, holds that if any one of the Federal questions enumerated in section 5 of the act of 1891 appear anywhere in the pleadings, or in the record, the case can be brought by writ of error to this court.

Suppose two cases then, one like the case of Loeb v. Columbia Township Trustees, in which the declaration discloses diverse citizenship as the ground of original jurisdiction in the Circuit Court, and one of the Federal questions enumerated in section 5 of the act of 1891 is disclosed in subsequent proceedings in the case. An appeal or writ of error lies to this court. The other of the nature of the Northern Pacific Railroad Company v. Amato, and the Union Pacific Railway Company v. Harris, *supra*, in which the original jurisdiction of the Circuit Court is invoked solely on the ground of diverse citizenship, and in which the Federal question not embraced in section 5 of the act of 1891, and as to which the judgment or decree of the Circuit Court of Appeals is not final, under section 6 of the act, is disclosed by subsequent proceedings in the record. In this case if the doctrine of the Mining Company v. Turck prevails, there could be no writ of error or appeal to this court, and yet the statute of 1891, in its terms and provisions, makes no such distinction, and as far as we can see there is no such distinction, and no reason for such distinction.

But, again, if the present case is one which falls strictly within the principle of Mining Company v. Turck, and kindred cases, then it is to be remembered that all these cases are based to a great extent on the doctrine that the act of 1891 was not intended to give a party, defeated in the Circuit Court, the right to have his case determined upon its merits both in this court and in the Circuit Court of Appeals.

In the case at bar, the plaintiff in error has had no trial on

the merits, either in the Circuit Court of Appeals or in this court. In fact he has had no trial on the merits in any court. It is true the trial in the Circuit Court may technically be called a trial on the merits, but the record discloses, that the judge erroneously (as we insist) deprived the plaintiff in error of his right to a trial by jury, under the form of a peremptory charge. While judges of the Circuit Courts of the United States are authorized to give peremptory charges, yet it is a power which should not often be exercised. As Mr. Justice Harlan said in Travelers Ins. Co. v. Randolph, 78 Fed. 764, "A peremptory instruction should not be given to the jury, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking such instruction; and a case cannot be properly withdrawn from the jury because in the judgment of the court there is a preponderance of evidence in favor of the party asking the instruction." The Constitution of the United States, as well as the States, recognize the right to trial by jury as one of the most sacred belonging to the citizens of this country. The Circuit Court of Appeals dismissed the writ of error, taken by plaintiff in error, to that court upon a technicality, and, as we also insist, erroneously. Thus it is, although there is a Federal question in this case which appears in the record, if the present writ of error is dismissed the plaintiff in error will have been denied all right of review, both in this court and in the Circuit Court of Appeals. But apart from the views presented above, we insist, this case belongs to the class of cases illustrated by the Northern Pacific Railroad Company v. Amato, and the Union Pacific Railway Company v. Harris, heretofore cited. In both of those cases the declarations or complaints alleged diverse citizenship. The Federal question involved, apart from diverse citizenship, was that the defendants were corporations under the laws of the United States.

It was held, as heretofore explained, that this Federal question was not embraced in section 5 of the act of 1891 and was not one, as to which the judgment or decision of the Circuit Court of Appeals was final under section 6 of the act of 1891.

In the present case the Federal question, apart from diverse citizenship, is, that the parties hold under grants from different States. Section 5 of the act of 1891 provides for an appeal or writ of error direct to this court in cases that involve the construction or application of the Constitution of the United States. If these terms are given their widest meaning, then they will embrace all the other classes of cases enumerated in section 5. For instance—the next class of cases referred to in said section is, where "the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question." This class of cases involves the construction of the Constitution of the United States, and arises under the Constitution of the United States. So too, the next class of cases, viz.: cases in which the Constitution, or law of a State, is claimed to be in contravention of the Constitution of the United States, involve the construction and application of the Constitution. The Constitution and application of the Constitution of the United States broadly construed embraces every ground of Federal jurisdiction, including diverse citizenship, questions arising under the laws of the United States, and treaties of the United States, and the acts and doings of its officers in enforcing its laws and treaties, in fact all Federal questions. A corporation chartered under the laws of the United States ultimately, and finally, rests its right of corporate existence upon the Constitution of the United States. In the two cases last cited, however, this special provision of section 5 of the act of 1891 was held not to embrace the cases arising under the laws of the United States, which did not involve the question as to whether said laws were constitu-

tional. Thus, it seems, upon a familiar principle that the enumeration of six particular classes of cases is a limitation upon the scope and effect of each particular class.

"The construction or application of the Constitution of the United States" as used in section 5 of this act does not embrace cases which simply arise under the laws of the United States—that is, cases where the rights of one of the parties depend for their existence and validity upon the laws of the United States.

Northern Pacific R. R. Co. v. Amato.

Union Pacific Railway Co. v. Harris.

It does not embrace cases in which the constitutionality of a law of the United States is involved, because cases of this kind are provided for in the next clause of said section 5.

It does not embrace the validity and construction of any treaty of the United States, because cases of this kind are also provided for in the next clause of said section.

It does not embrace cases in which the Constitution or a law of a State is claimed to be in contravention of the Constitution of the United States, because these cases are provided for in the last clause of said section.

It does not embrace questions involving the jurisdiction of the Circuit Court, nor prize cases, nor cases of a capital or other infamous crime, because all these cases are provided for in the first three clauses of said section 5.

It does not embrace cases of diverse citizenship, nor cases between citizens of the United States and aliens, nor patent cases, nor revenue cases, in which the United States is a party, nor criminal cases involving a crime less than capital or infamous, nor admiralty cases, for all these cases are provided for in section 6 of said act.

The Constitution of the United States gives the courts of the United States jurisdiction in cases between citizens of

different States, and between citizens of the same State, claiming lands under grants from different States.

If "the construction or application of the Constitution of the United States," as used in section 5 of the act of 1891, does not embrace cases between citizens of different States, upon what ground can it be said to embrace cases between citizens of the same State claiming under grants of different States.

The record shows that the issue as to boundary and the issue as to grants from the different States were plainly made. The record does not show that there was any dispute about the application of the Constitution, or any dispute or controversy over whether the Constitution applied, or what construction was to be placed on the Constitution. It therefore does not involve the construction or application of the Constitution, and so does not fall within the purview of section 5.

Cornell v. Green, 163 U. S. 75, cited in 184 U. S. 295.

Now, probably, there is no clause of the Federal Constitution, and no law passed by Congress, which so little involves the construction and application of the Constitution as the particular provisions relied on by plaintiff in error. Parties claiming under grants from different States are allowed to come into the Federal Court in order to obtain an impartial trial. The question as to the validity of the grants we may say never depended upon any construction of the Constitution of the United States. Hence it is, we insist, that not being enumerated specifically in section 5 of the act of 1891, cases of parties claiming under grants of different States are not embraced therein, nor are they embraced in the classes of cases enumerated in section 6 of the act of 1891, in which the judgment and decree of the Circuit Court of Appeals is final. If we are right in this the result is that the writ of error should be maintained, it being sufficient under the case of

Loeb v. Columbia Township Trustees that the question appears definitely elsewhere in the record.

II.

It is next insisted by defendant in error, that inasmuch as the plaintiff in error claims under tax deeds from the State of Arkansas, this is not a case of parties claiming under grants from different States. The record discloses that the defendant in error claims under grants from the State of Tennessee (R. 13, 15, 30), and that the plaintiff in error claims under tax deeds made by the State of Arkansas through its proper officials. (R. 145, 149, 152.)

The plaintiff in error's titles run back to patents of the United States issued while Arkansas was a territory. (R. 230, 232.) By all the authorities, patents or grants are in substance nothing more than deeds. Each is a method of conveying titles to lands. Grants and patents are terms descriptive of conveyances of public lands by governments. Deeds commonly refer to conveyances by individuals.

In Pawlett v. Clark, 9 Cranch 293, the plaintiff claimed under a grant from the State of Vermont, and the defendants claimed under a grant from the State of New Hampshire, made at the time when the latter State comprehended the whole territory of the former State. It was argued that the grant under which the defendants claimed was not a grant of a different State, within the meaning of the Constitution, because Vermont at the time of its emanation was not a distinct government, but was included in the same sovereignty as New Hampshire. The court held that there was nothing in the objection, because the Constitution intended to secure an impartial tribunal for the decision of such questions, and it supposed that a State tribunal might not stand indifferent

in a controversy where the claims of its own sovereignty were in conflict with those of another sovereignty, and it had no reference whatsoever to the antecedent situation of the territory whether included in one sovereignty or another. See to same effect,

Colson v. Lewis, 2 Wheaton 377.

So it is manifest that if a State court would not be indifferent where its sovereignty has conveyed by grant, it would hardly be indifferent if the conveyance were by a tax deed. There would be as much motive for sustaining the one as the other.

III.

It is next insisted for the defendant in error that, in order to come within this provision of the Constitution, both requisites—concurrent citizenship, and the cause of action specified—that is, the claiming under grants of different States, must be presented. We submit, however, it is clear that the Constitution did not mean to exclude any cases of conflict of titles from different States from the jurisdiction of the United States courts. It is evident that it was regarded as making provisions for all cases where conflicting grants come into question, though a literal construction would perhaps hold otherwise. It would seem that the Constitution regarded every case as provided for, when it gave jurisdiction dependent upon personal citizenship of all cases, and jurisdiction dependent upon subject matter, even though the personal reason did not exist; but it can not reasonably be supposed that the instrument was intended to exclude any right dependent upon the subject matter, because the same result as to citizenship of different States was attained by the personal provision. Such a contention would eliminate from the field of Federal jurisdiction every ground set forth in the Constitu-

tion (excepting diverse citizenship), if these grounds existed concurrently with diverse citizenship. To illustrate—if one litigant claims title under a State law, and the other insists that said law was in conflict with the Constitution of the United States, and they were citizens of different States, could it be said, that because the jurisdiction of the United States might be invoked on the ground of diverse citizenship the other ground of jurisdiction was eliminated and destroyed? In substance, it must have been intended to cover all cases—the one by the personal clause, the other by the clause controlled by the subject matter. It would seem, therefore, that if the conflict of grants appeared without any allegation as to citizenship, the court would take the jurisdiction as established, on the ground of subject matter. However this may be, it is clear, that such a case would manifestly be within every reason on which the Constitution can be supposed to proceed. It can not be that it was intended to give citizens of the same State preference over non-citizens: a personal privilege in this particular case, when it was in the same sentence conferring a personal privilege on grounds diametrically opposite. Probably this did cover every possible case up to the time the peculiar provision of the Court of Appeals statute came into existence, which in this case gives it a phase, or presentation, that could not possibly have been considered when these clauses were adopted. Here, the case made as to subject matter, co-exists with the case made by reason of personal privilege—that is, the question of grants of different States co-exists with the jurisdiction as a personal privilege of the favored class—non-citizens—the class to be protected from the bias of the local courts. But here the jurisdiction *strictissmi juris* is obtained solely on the personal privilege of diverse citizenship, yet the other exists and forms an element entitled to greater weight than the personal privilege, in that it is granted by the Constitution and the act of 1888, 25th

Statutes at Large, page 433, to a class from which the personal privilege is withheld—that is, to citizens of the same State. In other words, it was not intended to give to citizens of the same State (in the precise state of facts which exist here) a writ of error without any restrictions, and to citizens of different States a like right only on special application and order. There would seem to be no reason why citizens of the same State claiming under grants from different States should be entitled to an appeal or writ of error as a matter of right, while citizens of different States claiming under grants from different States should be denied that right. The ground of jurisdiction on account of titles claimed under different States is one of higher dignity than the ground of citizenship of different States. It is a quasi-interstate question. When the States are parties it is an interstate question for active relief by original bill in this court; when it comes up between citizens the tendency and purpose of the jurisdiction is to prevent a conflict between the States, by providing the same final arbiter on writ of error as where the States are directly parties. This idea is recognized in the Court of Appeals act in the distinction between cases in which the jurisdiction depends on diverse citizenship entirely, and in cases of titles emanating from different States. In the one case the judgment or decree of the court is final, in the other it is not. The provision in the Constitution really means controversies between citizens of different States and controversies between persons claiming under grants from different States, *even though* they be citizens of the same State. Aside from the jurisdiction naturally belonging to the United States as a government, in cases arising under its Constitution, laws and treaties, there are three gradations in the incidental jurisdiction. First, original jurisdiction in the Supreme Court of the United States of questions between the States and questions affecting embassadors, ministers, consuls, etc. Second,

appellate jurisdiction of questions involving titles under different States. Third, jurisdiction of citizens of different States. The second ground of jurisdiction is given, not because of the citizenship in the same State, but in spite of it.

We insist that the Constitution of the United States on this point should be construed as though it read, the judicial power shall extend to "controversies between citizens of different States and between parties claiming lands under grants of different States, *even though* they be citizens of the same State;" and we insist that it was never the intention of the framers of the Constitution, or of Congress, to make any discrimination or difference as to the rights of parties claiming lands under grants of different States, because in one case they might be citizens of the same State, and in the other citizens of different States, and we submit the proposition that if a record in the Federal court discloses simply the fact that the parties are claiming under grants from different States the jurisdiction would be sustained, even though the record is entirely silent as to the citizenship of the parties. In other words, we insist that in order to sustain the jurisdiction on the ground that the parties are claiming under grants from different States, it is not necessary to allege affirmatively, or to make it appear affirmatively, that the parties are citizens of the same State. What would be done where a citizen of a territory or of the District of Columbia and a citizen of one of the States claimed land under grants from different States?

In the case of Pope v. The Railroad Company, 173 U. S. 573, it is said, "Diversity of citizenship confers jurisdiction, irrespective of the cause of action. But if the cause of action arises under the Constitution, or laws, or treaties of the United States, then the jurisdiction of the Circuit Court may be maintained irrespective of citizenship."

IV.

It is next insisted that Congress has not conferred original jurisdiction on any Federal court of controversies involving grants of lands by different States to citizens of the same State, and that therefore no suit can be brought in a Federal court originally on this ground.

This proposition is answered by the case of Pawlett v. Clark, 9 Cranch, cited above. That case was instituted originally in the Circuit Court of the United States.

THOS. B. TURLEY,
J. B. HEISKELL,
Attorneys for Plaintiff in Error.

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No. 89.

Sup. Ct. Brf. of Heiskell for P. E.

Supreme Court of the United States

OCTOBER TERM, 1902.

Filed Nov. 15, 1902.

No. 89.

E. M. AYRES, PLAINTIFF IN ERROR,

v.

JOHN H. POLSDORFER AND WIFE.

ARGUMENT OF J. B. HEISKELL FOR AYRES.

Is this a case where the question is one of the application of the construction of the Constitution under section 5? The question of fact is the one that is material to the decision of the case. Does this land lie in Arkansas or Tennessee? Is the title derived from Arkansas or the title derived from Tennessee paramount? This is the question on which the title turns. If the land lies in Arkansas, there is no question about the *application* of the Constitution. It is not insisted here and was not below that there was any question about whether the statute would apply—all parties were agreed about the point of law that if the land lay in Arkan-

sas the grant of Tennessee was of no avail—there was no question whether the statute and the Constitution applied. The question was upon the facts, *i. e.*, upon matter that did not involve any doubt or question as to application or construction, yet which undoubtedly involved a matter distinctly of Federal cognizance, as involving the policy of settling in the Federal courts the boundary between States, whether arising in a direct issue between the States as parties or incidentally between private parties.

Cornell *v.* Green, 163 U. S., 75.

Let us consider the purpose and aim of this clause. The word *jurisdiction* may be used for the purpose of making essential the mode of obtaining the right to try, or it may be used for the purpose more important, in view of this statute, of designating the subject-matter of the suit. In and of itself, the mode or cause of jurisdiction below is immaterial, so that it is effectual to bring the case into the circuit court. It is as well there, as secure of its standing in that court if brought there for diverse citizenship, as if it involves a construction of the most difficult and important question that could arise under the Constitution. Therefore it would seem impossible that the law intends to make the immaterial consideration of the ground of jurisdiction—*qua* ground of jurisdiction—all grounds of jurisdiction as basis of a right to resort to the particular court being equally effective—control the right to further review in the Supreme Court. It must then have had some ulterior view in which this description of a class of cases did designate or was sup-

posed to designate a character of case necessarily involving something other than the bias of a State court in favor of its own citizen and against the citizen of another State. Now, diverse citizenship is evidently ground of jurisdiction that claims but little favor when it stands alone, as the ground upon which the court is called to grant any favor or protection other than to substitute itself for the State court, as good as any as a cause to take jurisdiction, but not as indicating a question involved of a character to justify appeal. It follows that the law does not intend to make that which is immaterial to the validity of the *locus standi* a test of the right to a writ of error, but that it is the ulterior purpose of excluding cases involving no other question more important of itself than that of residence or citizenship; therefore the word "entirely." But if any cause of jurisdiction exists in the case which does not, cannot fortify the parties' position, standing in court—for it cannot be more perfectly secure by any extraneous aid than perfectly secure by diverse citizenship—then if that other ground justifies a writ of error of right, it must be because it *must* involve something else—some question more favored as a cause for review than the questions which a case depending on diverse citizenship must give rise to. It must be because any ground but that exclusively must involve a question of necessity more cogent as a ground for review.

If this view is correct and the subject-matter involved in the suit is the cause, why the cases are distinguished, and one is subject to writ of error of right and the other not, it necessarily results that the plaintiff cannot restrict the defendant's right of review by electing to set up one cause of jurisdiction instead of another, or of both; but as the sub-

stantive and effectual reason for the right to review is the *matter* to be considered, its existence is the important and controlling thing, and not the manner in which its existence is shown, if it *sufficiently* appears by the *record*.

Loeb *v.* Col. Sp. Trustees, 179 U. S., 473:

When a question is made whether the plaintiff has a case in which the circuit court can take jurisdiction, it is not unreasonable to require that he show in his declaration his title to sue in that court; but when the question is upon the right of the defendant to a review, it is hardly consistent with reason to require him to show his right by the allegations of his adversary, the plaintiff. All that can be required of him would seem to be that he make it appear by the record.

The Constitution, article 3, section 2, provides that the courts of the United States shall have jurisdiction of cases "between citizens of different States and between citizens of the *same* State claiming lands under grants from different States."

Now, it is clear that the Constitution did not mean to exclude any cases of conflict of grants of different States from the jurisdiction of the United States courts.

It is evident that it was intended to make and was regarded as making provision for all cases where conflicting grants come in question. It would seem that the Constitution regarded every case as being provided for, when it gave jurisdiction dependent upon personal citizenship of all cases, and jurisdiction dependent on subject-matter, even though the personal reason did not exist; but it cannot reasonably

be supposed that that instrument was intended to exclude any right dependent upon the subject-matter, because the same result as to citizens of different States was attained by the personal provision.

In substance it must have been intended to cover and must have covered all cases—the one by the personal clause, the other by the clause controlled by the subject-matter. It would seem, therefore, that if the conflicts of grants appeared without any allegation as to citizenship, the court would take the jurisdiction as established on the ground of subject-matter.

However this may be, it is clear that such a case would manifestly be within every reason on which the Constitution or the statute can be supposed to proceed. It cannot be that it was intended to give citizens of the same State any preference over non-citizens, or, in other words, to give a special personal privilege in this particular case to citizens of the same State when it was in the same sentence conferring a preferential personal privilege on grounds diametrically opposite, *i. e.*, citizenship of different States.

Probably these provisions did cover every possible case up to the peculiar provision of the Court of Appeals Statute, which in this case gives it a phase of presentation not within the possible contemplation of the draftsmen of the Constitution, when adopted.

In the case at bar the subject-matter coexists with the personal-privilege jurisdiction; that is, the question of grants of different States coexists with the jurisdiction as a personal privilege to the favored class—the class to be protected from the bias of the local State courts.

But here the jurisdiction in the court below is obtained solely on the personal privilege of diverse citizenship; yet the other matter exists (and the jurisdiction here depends on it) and forms an element entitled to greater weight as a ground for review than the personal privilege, in that it is granted to a class from which the personal privilege is withheld; it is granted for a more controlling reason, but is intended to be granted to both citizens and non-citizens, one under the form and name of personal privilege, to the other under the name of a ground of jurisdiction, but it cannot be supposed that it was intended in any case to deny it to either. The words of the Constitution give it to both, severally in form but with the same intent.

Has the statute restricted the writ of error as of right in such case, where the jurisdiction is dependent on the subject-matter, and required the case where it depends on citizenship to be submitted to the discretion of the court on motion for certiorari? Has it required that order for review only as to the more favored class of suitors, thus discriminating further against the favored class? That cannot have been intended.

The statute certainly has given to citizens of the same State, in the precise state of facts which exists here, except as to citizenship, a writ of error without any restriction; that is, if this suit was between citizens of the same State, brought into the Federal court upon the ground that it involved conflict of grants, it would certainly entitle the parties to the writ of error of right and absolutely. To citizens of different States does it give a like right only on special application and order for certiorari? It would seem not.

But if we are wrong in this view, yet in the exercise of

that discretion which the court unquestionably has, we respectfully insist that the element of subject-matter as a ground of jurisdiction ought to be controlling; and that within the reason and policy of the Constitution, and within the reason and policy of the statute, as being a matter more important than the personal privilege of non-citizens, it entitles us to the certiorari

In other words, if the court can in the exercise of its discretion carry out the plain policy of the statute and Constitution as to conflict of grants of different States, it should so exercise that discretion as to give to the discretionary remedy by certiorari the same effect as if the coexisting cause of subject-matter was the ground and the peremptory writ of error could on that ground be invoked in a suit between citizens of the same State.

Take another view. There exists in this case two grounds of jurisdiction. The plaintiff below had the right to bring the suit there under one, and it being sufficient the court takes jurisdiction. But the other exists, though not stated by the plaintiff. The defendant is not precluded by plaintiff's failure to state it.

Is this a *petitio a principii?*

It assumes that the Constitution, properly construed, means to give the jurisdiction where the citizenship is different as well as where it is the same. It does give it to the non-citizen in a form which includes much more. I insist, then, that the statute intends to designate a class of *cases* as a means of comprehending in a brief and compendious phrase a class of *subjects* which do not rise in dignity and importance as a ground of review above the grade of the personal privilege of diverse citizenship cases and to exclude

them from the review as of right. Diverse citizenship does not of itself *necessarily* bring into a case any special question or class of questions. It may cover any humdrum lawsuit on a note of hand or for an assault—it may involve anything—but not of *necessity* anything of national importance or fit for review in a Federal Supreme Court. It is therefore intended to exclude from review in this court these humdrum cases, but to leave included in the class of cases for review here of right those in which there is an element of jurisdiction of a grade and dignity above that of diverse citizenship—any case, in other words, in which a Federal question or a question necessarily of Federal jurisdiction is involved—but leaving it to the discretion of the court to take jurisdiction by certiorari of such cases even involving State law only as from their exceptional importance in the principles involved—perhaps even where stupendous interests or amounts are involved, as to impress the court as justifying their revision. Every other ground of jurisdiction but adverse citizenship involves federal questions or this quasi-interstate matter—of Federal jurisdiction. The leading idea of the statute, therefore, is not jurisdiction of the case in the court of first instance as jurisdiction, but as describing a class of things. It might have been said in the same section, "all cases within the jurisdiction of the admiralty courts," and this would have described a class in similar manner to that we are considering; but using that phraseology would involve no question of whether the court of original jurisdiction had properly obtained the jurisdiction of the case on trial or how it appeared. It would only involve the question whether it was one of the designated class. So here

the evident intent of the statute is to attain the same object. It is not so clearly expressed, but it does clearly admit of that construction. That is the only construction which attributes a wise purpose to this provision, and the considerations we have urged not only justify, but demand that construction. It strikes at substance—makes that the goal—does not stick in the bark, but seeks the heart of the matter, and finds it. *Bona judicis est ampliare jurisdictione.*

J. B. HEISKELL,
For Plaintiff in Error.